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In The Supreme Court of the United States

JAMES LARUE,
Petitioner,
v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonpartisan, nonprofit membership organization of nearly 39 million persons age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older persons. Countless members participate in or receive employer-funded health, pension, disability, and other employee and retiree benefit plans. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.[2/]

Given ERISA's preemptive force, *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004), it is imperative that participants have meaningful recourse under ERISA to protect their retirement savings where fiduciaries wrongfully interfere with earned benefits that may make a crucial difference in

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[1/] Pursuant to SUP. CT. R. 37.6, *amicus curiae* AARP states that no person or entity other than *amicus curiae*, and its undersigned counsel, made a monetary contribution to the preparation or submission of this brief and that no counsel for any party authored this brief in whole or in part. The written consents of the parties have been filed with the Clerk of the Court pursuant to SUP. CT. R. 37.2(a).

[2/] As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving the scope of a fiduciary's duties as well as appropriate remedies under ERISA. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Milofsky v. Am. Airlines*, 442 F.3d 311 (5th Cir. 2006); *In re Schering Plough ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005); *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003).

employees' retirement security. The resolution of the issues herein will have a direct and vital bearing on individuals' ability to obtain those benefits which will foster their economic security. AARP, therefore, submits its brief *amicus curiae* to facilitate a full consideration by this Court of these issues.

SUMMARY OF ARGUMENT

If this Court affirms the Fourth Circuit's decision in its entirety, not only would 401(k) plan participants have no recourse to obtain monetary relief to their individual accounts under the Employee Retirement Income Security Act, but trillions of dollars in the 401(k) plan system would be effectively unregulated. AARP submits, however, that a claim like the one at issue here – for breach of fiduciary duty for failing to follow investment instructions – asserts a claim for a breach of a fiduciary's statutory duties under ERISA, and therefore the claim is cognizable under ERISA § 502(a)(2) for relief to the plan as a whole. If this Court were to hold that the claim does not meet the parameters to state a claim under ERISA § 502(a)(2), then AARP submits that the claim is cognizable under ERISA § 502(a)(3) because the basis of the claim – breach of fiduciary duty by a beneficiary against a fiduciary – and the nature of the underlying remedy sought are both equitable, and thus the claim requests a category of relief that was typically available in equity.

ARGUMENT

I. AFFIRMANCE OF THE FOURTH CIRCUIT'S DECISION IN ITS ENTIRETY WILL DISCOURAGE PARTICIPATION IN 401(K) PLANS AND LEAVE TRILLIONS OF DOLLARS IN THE BENEFIT SYSTEM EFFECTIVELY UNREGULATED.

As of the end of the first quarter of 2007, employer-sponsored defined contribution plans held $3.26 trillion in assets, *Flow of Funds Accounts of the United States, Flows and Outstandings First Quarter 2007*, FEDERAL RESERVE STATISTICAL RELEASE at Table L. 118.c (June 7, 2007), with $2.698 trillion in 401(k) plans. Investment Company Institute, *Frequently Asked Questions About 401(k) Plans*, *available at* http://www.ici.org/home/faqs_401k.html (June 2007). Since 1981, the number of 401(k) plans has significantly increased, making defined contribution plans the nation's primary retirement savings vehicle. PETER BRADY & SARAH HOLDEN, *The U.S. Retirement Markets, 2006*, RESEARCH FUNDAMENTALS (Investment Company Institute, Washington, D.C.), July 2007, *available at* http://www.ici.org/pdf/fm-v16n3.pdf. However, participation in 401(k) plans has never been universal. Bureau of Labor Statistics, U.S. Department of Labor, *National Compensation Survey: Employee Benefits in Private Industry in the United States, Aug. 2006*, at 2, *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf. Moreover, evidence suggests that many workers are failing to contribute a sufficient amount to meet their retirement income needs. A. Munnell, A. Webb & F. Golub-Sass, Center for Retirement Research at Boston College, *Is There Really A Retirement Savings Crisis? An NRRI Analysis* at 2 (No. 7-11 Aug. 2007), *available at* http://crr.bc.edu/images/stories/Briefs/ib_7-11.pdf. Last year, Congress took steps to encourage increased

participation in 401(k) plans as well as to promote increased contributions. *See* Pension Protection Act of 2006, H.R. Res. 4 §§ 902(a) (b), (d)(1) 109th Cong. (2006) (enacted) (401(k) automatic contribution arrangements).

If, in order to bring suit under Section 502(a)(2) of ERISA for breaches of fiduciary duty, all participants of a plan must suffer a loss to their plan accounts, the only remaining option for these participants will be to attempt to remedy fiduciary breaches on an individual basis under ERISA § 502(a)(3). However, if the Court interprets ERISA § 502(a)(3) - the subsection of ERISA authorizing individual claims for fiduciary breach - to exclude such participants from seeking monetary relief for breaches of fiduciary duty, then the Court will effectively foreclose all monetary relief to 401(k) plan participants, without regard to the gravity of the fiduciary breach or the magnitude of the resulting loss.

Complete affirmance of the Fourth Circuit's opinion threatens Congress' recent attempts to increase participation in and contribution amounts to 401(k) plans.[3/] While it is accepted that 401(k) participants assume investment and mortality risk when they participate in 401(k) plans, *see* MARC KRONSON, *Employee Costs and Risks in 401(k) Plans*, COMPENSATION AND WORKING CONDITIONS (Summer 2000), *available at* http://www.bls.gov/opub/cwc/archive/summer2000art2.pdf., no one expects that they will have to assume the risk of the fiduciary's potential malfeasance and negligence. Participants are well aware of the recent dramatic losses in retirement savings held in 401(k) plans due to corporate scandals such as WorldCom and Enron. And, they

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[3/] Injunctive relief does not restore monetary losses to participants. To use an analogy, it removes the hand from the cookie jar, but does nothing to replenish the cookies.

have firsthand experience of the impact when there is a market down turn. AARP, IMPACT OF STOCK MARKET DECLINE ON 50-70 YEAR OLD INVESTORS, *available at* http://research.aarp.org/econ/market_decline.html (December 2002) (explaining that many individuals over the age of 50 postponed their retirements, returned to work, looked for work after their retirements, or made other adjustments in their lifestyles). If participants know that they have no recourse in the event that plan fiduciaries cause them to lose all or part of their retirement monies, many workers may well question not only their level of contributions, but also their initial or continued participation in 401(k) plans.

Finally, during the last twenty-five years, the American employee benefit system has evolved so that individuals are being required to take more responsibility for their retirement and health benefits.[4/] *See generally* GAO, EMPLOYER-SPONSORED HEALTH AND RETIREMENT BENEFITS: EFFORTS TO CONTROL EMPLOYER COSTS AND THE IMPLICATIONS FOR WORKERS at 3-4, 7-8 (GAO-07-355, March 2007). It seems absurd that these plans – with trillions of dollars in them – would be the ones that Congress would leave unregulated in the employee benefit system.

Given the circumstances from which ERISA arose, Congress could not have intended to leave 401(k) participants with no remedy for monetary losses if fiduciaries breach their duty to participants. Nor could Congress have intended to leave 401(k) plans – with their trillions of dollars – so unregulated. *See generally* James. A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-*

[4/] Although AARP has focused on 401(k) plans in its brief due to the facts of this case, the problems suggested would be similar for employee contributory health plans including Health Savings Accounts.

Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683 (2001).

II. SECTION 502(a)(2) AUTHORIZES A PLAN PARTICIPANT TO RECOVER MONETARY LOSSES TO AN INDIVIDUAL ACCOUNT.

A. The Court Should Refuse To Read Limitations Into ERISA § 502 Where None Are Stated.

Congress enacted ERISA to protect the interests of participants and their beneficiaries in employee benefit plans by setting out substantive regulatory requirements for employee benefit plans including standards of conduct, responsibility, and obligation for fiduciaries and to provide for appropriate remedies, sanctions, and ready access to the federal courts. ERISA § 2(b), 29 U.S.C. § 1001(b); *Aetna Health Inc. v. Davila*, 542 U.S. at 208; *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993). When employers establish employee benefit plans, they must abide by these standards. Congress' purpose was to ensure that employees would receive the retirement benefits they were promised. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

Congress enabled participants to protect the financial integrity of their plans, and thus their benefits, through ERISA's civil enforcement provisions. When interpreting ERISA § 502(a), the Court repeatedly has looked at the plain language of ERISA, the "evident care" with which it was crafted, the structure of the statute, and the policies underlying ERISA. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (this Court is "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA"). The Court concluded that the precise language of

the statute must be followed. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens*, 508 U.S. 248; *Russell*, 473 U.S. 134. As a result, the Court has refused to infer claims for relief and remedies which are not specifically enumerated in these civil enforcement provisions. *Mertens*, 508 U.S. at 253; *Russell*, 473 U.S. at 147. Conversely, the Court has refused to read in limitations to these civil enforcement provisions where there are none stated in § 502(a)(2). *Harris Trust*, 530 U.S. at 246. This case should be treated no differently. No limitation should be read into §§ 502(a) and 409 based on the type of plan that is involved in the alleged breach of duties by a plan fiduciary.

Section 502(a)(2) permits a civil action to be brought "by a participant, beneficiary or fiduciary for appropriate relief under 409." 29 U.S.C. § 1132(a)(2). Section 409 provides that any relief, whether legal or equitable, to remedy a fiduciary breach will flow to the "plan." 29 U.S.C. § 1109. "[T]here is no basis whatsoever in this statutory framework to preclude suits by participants and beneficiaries against fiduciaries who breach their statutory duties, regardless of . . . the many factual intricacies that determine the nature of an employee benefit plan." Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 225 (2004).

By its plain terms, § 409 does not differentiate among different types of ERISA plans. Indeed, a "plan" includes retirement as well as welfare plans. ERISA § 3(3), 29 U.S.C. § 1002(3). Moreover, Congress clearly knew how to differentiate between the two types of pension plans where it intended to do so. *Compare* ERISA § 3(35), 29 U.S.C. § 1002(35) (defined benefit plan definition) *with* ERISA

§ 3(34), 29 U.S.C. § 1002(34) (individual account plan definition); IRC § 415(b), 26 U.S.C. § 415(b) (benefit limitations for defined benefit plans) *with* IRC § 415(c), 26 U.S.C. § 415(c) (contribution limitations for defined contribution plans). Congress made no such differentiation in types of plans in the terms of § 409. *See Inter-modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 514-15 (1997) ("Had Congress intended . . . , it could have easily" done so).

Nor does § 409(a) distinguish between different types of losses to a plan. ERISA requires fiduciaries to compensate for "any losses" to a plan, without specifying if losses affect the entire plan, a major part of the plan, or only an insignificant part of the plan. 29 U.S.C. § 1109(a). The remedial provision of the statute is blind to the number of beneficiaries who have suffered loss the magnitude of their losses.

The only limit to the application of these civil enforcement provisions is that suits must be brought against a fiduciary. In *Russell*, the Court explained:

> It is of course true that the fiduciary obligations of plan administrators are to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance

> of proper records, the disclosure
> of specified information . . . .

473 U.S. at 142-143; *see also id.* at 142 n.9. Accordingly, if the asserted claims against the fiduciaries fall within the duties imposed on them by ERISA, relief is available under §502(a)(2). LaRue's claim, arising out of the fiduciary's alleged failure to discharge its duties to direct the investment of his account assets in accordance with his instructions, as prescribed under the terms of the plan, plainly meets *Russell*'s test for § 502(a)(2) relief. *Compare Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983) (alleging breach of fiduciary duty under § 502(a)(2) for failure to investigate investments) *with Harris Trust*, 530 U.S. 238 (alleging knowing participation of non-fiduciary in a fiduciary breach under § 502(a)(3)).

B. Merely Because A Recovery Is Eventually Distributed to a Participant's Individual Account Does Not Mean the Recovery Was Not on Behalf of the Plan.

ERISA defines LaRue's 401(k) as "a pension plan which provide[s] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." ERISA § 3(34), 29 U.S.C. § 1002(34).

An employer sponsoring a defined contribution plan does not establish a separate plan for every participant. Rather, an employer establishes one plan to which contributions are made on behalf of the employees who participate in the plan. 1 Michael J. Canan, QUALIFIED RETIREMENT PLANS § 3.1 (Practitioner ed. 1999). These "contributions are made to a

single funding vehicle, usually a trust," and "as amounts are contributed to the trust, they are allocated to the participant's account." DAVID A. LITTEL *et al.*, RETIREMENT SAVINGS PLANS: DESIGN, REGULATION, AND ADMINISTRATION OF CASH OR DEFERRED ARRANGEMENTS 6 (1993). Indeed, in order to be considered a qualified plan to render contributions tax deductible and to meet ERISA's fiduciary requirements, pension plans including 401(k) plans and Employee Stock Ownership Plan must be established as trusts. IRC § 401(a), 26 U.S.C. § 401(a); ERISA § 403, 29 U.S.C. § 1103. Accordingly, the trust as a separate legal entity holds any contributions and gains on those contributions for the beneficial interest of the trust's participants and beneficiaries. RESTATEMENT (SECOND) OF TRUSTS § 3 (1959) (hereinafter "RESTATEMENT").

Generally, the participant account is not actually an account in the conventional sense; it is simply "a bookkeeping entry" in which there is a separate entry in the plan for each participant. Littel, *supra* at 6. The actual plan, therefore, is made up of the individual accounts, and "the sum of all of the account balances . . . equals the total market value of the plan's assets." DAN M. MCGILL *et al.*, FUNDAMENTALS OF PRIVATE PENSIONS 247 (7th ed. 1996). All assets of these individual accounts are owned by the plan and held by the trustee for the benefit of each participant.

Where a suit seeks to recover for losses to an individual's account, the recovery will benefit the plan as a whole because the plan receives recovery proceeds to be allocated to account holders as appropriate. The plan fiduciary then credits the accounts of participants according to their respective interests in the recovery. Although funds are distributed to individual accounts, the funds are also subject to pro-rated charges on account to be applied toward the payment

of plan expenses, thereby benefiting all participants. *In re Schering-Plough Corp. ERISA Lit.*, 420 F.3d 231, 235 (3d Cir. 2005). The only access participants have to the award is through their plan accounts. Colleen E. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. MICH. J.L. REF. 469, 539 (2001). While the award may be distributed disproportionately among the respective individual accounts, the recovery is for the plan as a whole. Not only does the recovery for breach of fiduciary duty increase plan assets, but it also reinforces the integrity of the plan as a whole, thus benefiting each plan participant.

Notably, the Department of Labor's plan asset regulation concerning the transmission of participant contributions to plans is consistent with how 401(k) plans actually work and the language of § 409. *See* Regulation Relating to Definition of "Plan Assets" Participant Contributions, 61 FED. REG. 41,220 (Aug. 7, 1996) (codified at 29 C.F.R. § 2510.3-102 (1996)). Throughout the preamble, the Department makes clear that commentators understood the difference between transmitting contributions to the plan versus allocating contributions to the participants' individual accounts. *See, e.g., id.* at 41,221 ("[C]ommenters stated that each time participant contributions are transmitted to the plan, eligibility must be confirmed, contributions must be allocated to the participants' individual accounts, and the individual amounts must be reconciled to the aggregate amount."); *see also id.* at 41,222 ("Many commenters recognized that participant contributions could be segregated quickly and frequently into a trust established to temporarily hold participant contributions until they could be reconciled in a more practical and less costly manner.").

Although some defined contribution plans may be participant directed (such as 401(k) plans) so that the

participant chooses the manner in which the contributions are invested, other defined contribution plans such as money purchase plans invest the employer contributions for participants. *See* Canan, *supra* at § 3.11 ("[E]ven though the employer contribution . . . is credited to separate accounts for each employee, the trustee invests all of the funds in one certificate of deposit."). Congress recognized no distinction between types of plans and the manner in which investments are handled in different types of plans. *See* ERISA § 409; ERISA § 3(3); ERISA § 3(34). Rather, the distinction between the types of plans is made relevant only in § 404(c), which limits potential fiduciary liability in circumstances where a participant exercises control over the assets in his or her individual account.

C. The Determinative Factor for Whether a Suit Is Being Brought on Behalf of the Plan Is Not the Number or Percentage of Plan Participants Who May Be Injured, But Whether the Fiduciary's Statutory Duties Are Implicated.

Assessing whether a claim seeks to recover for the plan as a whole based on how many participants are affected, rather than based on whether recovery would go through the plan itself, has led to inconsistency among the circuits, not to mention analytical confusion. Many claims of fiduciary breach in connection with the administration of individual account plans will not affect every member of the plan to the same extent, as investments may vary from one account to another. Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. at 232. Some courts have emphasized a requirement that the "suit stands to benefit a large number of" participants, without defining "a large number." *Rogers v. Baxter Int'l, Inc.*, 417 F. Supp. 2d 974, 981 (N.D. Ill. 2006). Others have allowed suits

to go forward without any discussion of the size of the subset of affected participants, while still other courts have refused to allow claims in which dozens of participants were affected. *Compare Kuper v. Lovenko*, 66 F.3d 1447 (6th Cir. 1995) *with Mattassarin v. Lynch*, 174 F.3d 549, 565-66 (5th Cir. 1999).

A hypothetical offered by Professor Medill clearly demonstrates the reasons this Court should reject as a determinative factor in bringing a suit under § 502(a)(2) the distinction between a breach affecting all plan participants and one affecting only some. Professor Medill posits a scenario in which plaintiff-participants seek to recover either for investment expenses wrongly deducted from their accounts or for losses to the principal balance of their respective accounts. Assume further that because different investment options are available to participants in the plan, the breach may or may not affect the accounts of all participants in the plan. It is most likely that it will affect the participants unequally because the fees or losses will differ depending on each individual's investment allocations. Colleen E. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. MICH. J.L. REF. at 537. In evaluating the remedy necessary to restore the losses to the plan, the court will have to analyze the amount of damage to each individual account. *Id.* at 538. The calculation of damages to the plan is driven by the total dollar sum that was invested in the challenged investment vehicle rather than by the number of investors who selected that investment vehicle. The latter fact is irrelevant to consideration of whether the plan has suffered losses and to what extent.

Consequently, LaRue's breach of fiduciary claim for failing to follow his instructions to direct his investment of his account assets is cognizable under ERISA § 502(a)(2).

III. MONETARY RELIEF FOR A PARTICIPANT'S CLAIM AGAINST A FIDUCIARY FOR A BREACH OF ITS DUTY WAS TYPICALLY AVAILABLE IN EQUITY AND THEREFORE IS "EQUITABLE RELIEF" WITHIN THE MEANING OF ERISA § 502(A)(3).

A. The Basis for a Participant's Claim Against a Fiduciary for a Breach of Its Duty Is Always Equitable.

ERISA § 502(a)(3) permits participants to obtain "appropriate equitable relief" against plan fiduciaries to redress breaches of fiduciary duty. 29 U.S.C. § 1132(a)(3); *see also Varity*, 516 U.S. at 510. The Court has limited equitable relief under this section to "those categories of relief that were *typically* available in equity."[5/] *Mertens*, 508 U.S. at 256 (emphasis in original); *accord Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1873 (2006); *Great-West*, 534 U.S. at 210.

In *Great-West,* the Court emphasized that whether a remedy was typically available in equity "depends on the basis for the plaintiff's claim and the nature of the underlying

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[5/] "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (providing for the restoration of lost wages in a Fair Labor Standards Act case). Indeed, absent a clear command by Congress that a statute providing equitable relief excludes certain forms of relief, a court should presume that it has the discretion to exercise the full scope of equitable powers. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *accord Edelman v. Jordan*, 415 U.S. 651, 672 n.15 (1974).

remedies sought." *Great-West*, 534 U.S. at 213 (quotations omitted); *accord Sereboff*, 126 S. Ct. at 1874-75.

For analysis of participant claims against a fiduciary for breach of its duty, unlike claims in *Sereboff*, *Great-West* and *Mertens*, the common law of trusts must be the starting point, unless trust law is inconsistent with ERISA's language, structure, or purpose.[6] *See, e.g., Harris Trust*, 530 U.S. at 250; *Varity*, 516 U.S. at 497; *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA).

Unmistakably, any claim of a breach of fiduciary duty is based on trust law, and there is no doubt that such claim is always equitable. RESTATEMENT §§ 2, 2 cmt. b (1959) ("A trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title of the property is held to equitable duties . . ."). Thus, because LaRue's claim is a classic breach of fiduciary duty claim, it does not "falter" due to the basis of his claim. *Sereboff*, 126 S.Ct. at 1874.

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[6] Congress enacted ERISA because it found "that the common law of trusts did not offer completely satisfactory protection" to participants. *Varity*, 516 U.S. at 497.

B. The Nature of the Underlying Remedies Sought in this Case Are Equitable Because the Remedies of a Beneficiary Against a Trustee Are Always Equitable.

1. Standard current works conclude that the nature of underlying remedies for beneficiary claims against a fiduciary for breach of its fiduciary duty are always equitable.

To determine what relief was typically available in equity, the Court stated that "standard current works" including Dobbs and the Restatements would provide the answer. *Great-West*, 534 U.S. at 217. The failure of the court below to make this historical inquiry resulted in a misreading of *Mertens*, *Great-West*, and *Sereboff* in determining the nature of the underlying remedies sought by LaRue.

The Restatement of Trusts underscores that "the remedies of the beneficiary against the trustee are *exclusively equitable*." RESTATEMENT § 197 (emphasis added); *see also id.* § 199 (setting forth "equitable remedies of beneficiary"). As Professor Bogert explains:

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with *whatever remedy is necessary* to protect him and recompense him for loss, in so far (*sic*) as this can be done without injustice to the trustee or third parties.

> The court is not confined to a limited list of remedies but rather will mold the relief to protect the rights of the beneficiary according to the situation involved. *If equity cannot give the beneficiary the exact benefit to which the trust would entitle him, it will provide him the best possible substitute.*

GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 861, at 3-4 (rev. 2d ed. 1995) [hereinafter "BOGERT"] (emphasis added); *see also* A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 199.3, at 203-04, 206 (4th ed. 1988) (hereinafter "SCOTT & FRATCHER") (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary). Indeed, not only does the Restatement specifically provide that a beneficiary can maintain a suit to compel the trustee to perform his duties, but it also provides that suit may be brought to compel the trustee to redress any breach of trust. Such suits and the ensuing remedies are *always* equitable. RESTATEMENT §§ 197, 199 (a) & (c); *accord* SCOTT & FRATCHER, §§ 201, 205, at 219, 237 (where the trustee commits a breach of trust, the beneficiary can charge the trustee with any loss that resulted from the breach of trust); BOGERT § 862, at 34 (trustee may be directed by the court to pay damages to the beneficiary out of the trustee's own funds). Because the fiduciary-beneficiary relationship "is an obligation arising out of equity's demands on the conscience to act for the benefit of another person," Dan Dobbs, LAW OF REMEDIES § 10.4 (2d ed. 1993), it creates equitable rights and duties. When those duties are breached, all remedies ordered by the court are considered equitable

remedies. RESTATEMENT §§ 197, 199 (a) & (c); *accord* SCOTT & FRATCHER §§ 201, 205, at 219, 237; BOGERT § 862, at 34.

Accordingly, a beneficiary may obtain monetary relief against a fiduciary for a breach of trust generally and a breach of the duty of loyalty. *See* RESTATEMENT §§ 205, 206, cmts. and illus.; *see* SCOTT & FRATCHER § 199.1, at 206 (if the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel the trustee to redress the breach of trust by any means including the payment of money). A fiduciary can be ordered to restore the beneficiary to the position he or she would have been in but for the breach of trust. "If the [fiduciary's] breach of trust causes a loss, ..., the beneficiaries may surcharge the [fiduciary] for the amount necessary to compensate fully for the consequences of the breach." *See* RESTATEMENT § 205 cmt. a. Similar to the facts here, the Restatement illustrates the scenario where the fiduciary was negligent in the handling of the beneficiary's money, causing a loss to the beneficiary; in that case, the fiduciary was liable to the beneficiary for the total amount of the loss. *See id.*, illus. 1, 5.

As the Restatement plainly shows, merely because such a remedy includes a monetary award does not change its character as an equitable remedy. In accord is *Clews v. Jamieson*, 182 U.S. 461 (1901), where the Court found that a claim solely for money against a trustee for breach of its duty was equitable and refused to dismiss the claim on the basis that there was no adequate remedy at law. *Id.* at 478-79. Claims against a trustee are always equitable even if the final relief consists of money to be distributed "among all the beneficiaries who are entitled to share therein." *Id.* at 480.

Because LaRue's claim arises from a breach of the fiduciary-beneficiary relationship, the standard works

uniformly point to the conclusion that the nature of his underlying remedy -- monetary relief or surcharge -- is equitable.[7] *Great-West*, 534 U.S. at 213; *Sereboff*, 126 S. Ct. at 1874.

2. Supreme Court precedent on ERISA remedies is consistent with the standard works.

None of the Court's precedent concerning remedies under § 502(a)(3) – *Mertens*, *Great-West*, and *Sereboff* – held that monetary relief granted by a court of equity was outside of the panoply of equitable remedies under ERISA. Indeed, *Sereboff* unabashedly permitted monetary relief.

Mertens held, however, that a suit against a non-fiduciary for money was not equitable relief. 508 U.S. at 268. *Mertens* stressed that the inherent nature of the relief sought was dispositive, and in that case, plaintiff did not produce an independent basis establishing the equitable character of the relief he sought. *Mertens*, 508 U.S. at 256.

Great-West elaborated on the Court's position in *Mertens*, holding again that a general contractual claim against a non-fiduciary is a request for legal damages. 534 U.S. at 210. The Court emphasized that whether a remedy was equitable depends on the basis for the claim and "the nature of the underlying remedies sought." *Id.* at 213. Because Great-West

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[7] A court should "enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust." *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978). The appropriateness of the remedy will depend on numerous factors including the extent of the deviation from the terms of the trust and the practical availability of the various remedies. RESTATEMENT § 214 cmt. 2.b; *see generally* BOGERT § 861.

merely requested personal liability for the amount of the benefits provided to the Knudsons, neither a constructive trust nor an equitable lien could be imposed on any specific property in the defendants' possession so that the requested relief did not meet the parameters of equitable restitution and the suit was not cognizable under ERISA § 502(a)(3). *Id.* at 214, 221. Here, unlike *Great-West*, there is no underlying contractual obligation involved.

Similar to the facts in *Great-West*, *Sereboff* arose in the context of a claim for reimbursement of benefits to the plan on account of the participant's recovery from a third-party tortfeasor. 126 S. Ct. at 1872-73. In contrast to *Great-West* where the prayer for relief was one for personal liability for a general contract obligation, in *Sereboff* Mid Atlantic sought specifically identifiable funds over which a constructive trust or equitable lien could be placed. *Id.* at 1871. Relying on case law from the days of the divided bench, the Court held that the basis for the relief sought was clearly characterized as equitable -- an equitable lien by agreement. *Id.* at 1874-75. Thus, the claim in *Sereboff* met both prongs of the historical inquiry in *Great-West* -- the basis of the claim and the nature of its underlying remedy were both equitable.[8] *Id.*

In contrast to LaRue's claim here, neither *Mertens*, *Great-West*, nor *Sereboff* involved a beneficiary suing a

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[8] *Sereboff* is consistent with the meaning of "redress" which is used in Section 502(a)(3). "Redress" is defined as relief, compensation, or satisfaction for a wrong or injury, and its etymology indicates that it was interpreted to include monetary relief. Definitions from Dictionary.com, Redress, *available at* http://dictionary.reference.com/browse/redress. Interpreting redress to allow monetary relief is consistent with decisions from the divided court. *See, e.g., Marshall v. Knox*, 83 U.S. 551, 559-60 (1872); *see also* Oxford English Dictionary, Redress, available at www.oedonline.com.

fiduciary for a breach of its duty. *Mertens* distinguished between fiduciaries and non-fiduciaries, stating that although under the common law of trusts damages could be obtained from third-party non-fiduciaries for knowing participation in the trustee's breach of fiduciary duty, "only the trustee had fiduciary duties." *Mertens*, 508 U.S. at 262. Because ERISA uses a functional definition of fiduciary, more entities are covered under ERISA as fiduciaries than under the common law of trusts. Thus, consistent with the historical practice in courts of equity, more remedies should be available under ERISA against fiduciaries than against non-fiduciaries. This conclusion is consistent with the Court's allocation of liability between fiduciaries and non-fiduciaries based on the amount of control they have over the plan. *See id.* (ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds."); *accord Harris Trust*, 530 U.S. at 251 (ERISA may place greater limitations on remedies against parties "other than the principal wrongdoer," *e.g.*, the breaching fiduciary, including a showing that the non-fiduciary had been unjustly enriched with trust assets).

Finally, this analysis reconciles *Mertens* with *Varity* and *Great-West*. In citing ERISA § 2(b), the Court recognized ERISA's basic purposes favors a reading of § 502(a)(3) to provide participants with a remedy against fiduciaries. *See Varity*, 516 U.S. at 513. The Court further stated that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm *individuals* by denying injured beneficiaries a remedy." *Id.* (emphasis added). The undisputed equitable relief the *Varity* participants were seeking, among other things, included reinstatement into the plan and monetary relief. *See Great-West*, 534 U.S. at 221 n.5.

Here, the nature of the underlying remedy sought from the defendant fiduciary – monetary relief or surcharge – nestles comfortably within the bounds of ERISA's concept of "equitable relief." *See* RESTATEMENT §§ 197, 199(a) & (c); *accord* SCOTT & FRATCHER, §§ 201, 205 at 219, 237.

Therefore, because the basis for LaRue's claim for breach of fiduciary duty against the defendant-fiduciary is equitable and the nature of the underlying remedy that he seeks is equitable, his claim is cognizable under ERISA § 502(a)(3).

CONCLUSION

AARP submits that LaRue's claim here is eligible for relief under ERISA §§ 502(a)(2) and 409. If the Court determines that LaRue does not satisfy the requirements of those provisions, then AARP submits that § 502(a)(3) provides a sound basis for relief. For the reasons stated above, AARP respectfully urges the Court to reverse the decision of the Fourth Circuit Court of Appeals.

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